

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ROBERT C. SEDLMAYR )  
Plaintiff, ) 3:10-cv-0204-LRH-VPC  
v. )  
MORTGAGE LENDERS NETWORK USA, ) ORDER  
INC.; et al., )  
Defendants. )

Before the court is defendants Wells Fargo Bank, N.A. (“Wells Fargo”); MERSCORP, Inc. (“MERSCORP”); and Mortgage Electronic Registration Systems, Inc.’s (“MERS”) (collectively “moving defendants”) motion to dismiss the remanded claims (Doc. #37<sup>1</sup>) to which defendant US Bank National Association (“US Bank”), as trustee for Residential Asset Securities Corporation, joined (Doc. #43). Plaintiff Robert C. Sedlmayr filed an opposition (Doc. #41) to which moving defendants replied (Doc. #42).

Also before the court are defendant US Bank’s motion to dismiss (Doc. #11) and defendant Placer Title Company, Inc.’s (“Placer Title”) motion to dismiss (Doc. #16).

## I. Facts and Procedural History

In March 2006, Sedlmayr purchased real property through a loan issued by defendant

<sup>1</sup> Refers to the court's docket number.

1 Mortgage Lenders Network USA, Inc. Sedlmayr defaulted on the loan and defendants initiated non-  
 2 judicial foreclosure proceedings on the property.

3 Subsequently, on October 13, 2009, Sedlmayr filed a complaint alleging thirteen separate  
 4 causes of action against defendants: (1) unfair lending practices in violation of NRS 598D.100;  
 5 (2) conspiracy to commit fraud; (3) permanent injunction; (4) declaratory relief; (5) wrongful  
 6 foreclosure; (6) fraud through omission; (7) quiet title; (8) contractual breach of good faith and fair  
 7 dealing; (9) tortious breach of good faith and fair dealing; (10) civil conspiracy; (11) racketeering;  
 8 (12) unjust enrichment; and (13) fraud in the inducement. Doc. #1, Exhibit 2.

9 Meanwhile, in late 2009, the United States Judicial Panel on Multi-District Litigation  
 10 (“panel”) consolidated a series of cases in which plaintiffs alleged that MERS engaged in improper  
 11 business practices when processing home loans. The panel assigned Judge James A. Teilborg to  
 12 oversee these cases and preside over all issues (discovery, dispositive motions, settlement) except  
 13 for trials. *In re: Mortgage Electronic Registration Systems (MERS) Litigation*, MDL No. 2119.

14 On June 3, 2010, the panel issued a transfer order and consolidated the present action with  
 15 the MDL litigation. Doc. #23. However, as part of the transfer order, the panel transferred only  
 16 those claims that “relate to the formation and/or operation of MERS” and held that all other claims  
 17 “unrelated to the formation and/or operation of the MERS system are separately and simultaneously  
 18 remanded” to the district court in which they were first brought. *Id.*

19 On March 21, 2011, Judge Teilborg issued an initial remand order. Doc. #34. Pursuant to  
 20 that order Judge Teilborg remanded: (1) claim 1 for violation of unfair lending practices,  
 21 NRS 598D.100; (2) claim 10 for civil conspiracy as it relates to other remanded claims; (3) claim  
 22 11 for racketeering activity in violation of Nevada law as it relates to other remanded claims; (4)  
 23 claim 12 for unjust enrichment; (5) claim 3 for injunctive relief as it relates to the remanded claims;  
 24 and (6) claim 4 for declaratory relief as it relates to the remanded claims. *Id.* Thereafter, moving  
 25  
 26

<sup>2</sup> defendants filed the present motion to dismiss the remanded claims. Doc. #37.

## **II. Legal Standard**

Moving defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference, based on the court’s judicial experience and common sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of

<sup>2</sup> Defendant US Bank and Placer Title's motions to dismiss were filed prior to the order of remand. See Doc. ##11, 16. These motions address claims which are not before the court and contain arguments that are not applicable to the remanded claims in their present form. Therefore, the court shall deny these initial motions to dismiss without prejudice.

1 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*  
 2 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
 3 (internal quotation marks omitted). The court discounts these allegations because “they do nothing  
 4 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
 5 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to  
 6 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
 7 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

8 **III. Discussion**

9 **A. Unfair Lending Practices, NRS 598D.100**

10 NRS 598D.100 prohibits lenders from making loans “without determining, using  
 11 commercially reasonable means or mechanisms, that the borrower has the ability to repay the home  
 12 loan.” NRS 598D.100(1)(b). However, this suitability language was added in mid-2007 when the  
 13 statute was amended. Although Sedlmayr alleges that defendants violated the present version of the  
 14 statute, his loan originated in March 2006, prior to the current amendment. Therefore, Sedlmayr’s  
 15 loan cannot have violated the current statutory language requiring a determination that a borrower  
 16 has the ability to repay the loan.

17 Moreover, Sedlmayr’s unfair lending practices claim is barred by the applicable statute of  
 18 limitations. The statute of limitations on an unfair lending practices claim under NRS 598D is two  
 19 (2) years. *See* NRS § 11.190(3)(a). Sedlmayr purchased his property in March 2006, and did not file  
 20 the present action until 2010, over two years after the statute of limitations had expired.

21 Additionally, none of the moving defendants were involved in the origination of Sedlmayr’s  
 22 loan. Thus, they could not have violated the statute by lending Sedlmayr money “without  
 23 determining, using commercially reasonable means or mechanisms, that the borrower has the  
 24 ability to repay the home loan.” NRS 598D.100(1)(b). Accordingly, the court shall grant moving  
 25 defendants’ motion to dismiss as to this claim.

1           **B. Civil Conspiracy**

2           To establish a claim for civil conspiracy, a plaintiff must establish: (1) the commission of an  
 3 underlying tort; and (2) an agreement between the defendants to commit that tort. *GES, Inc. v.*  
 4 *Corbitt*, 21 P.3d 11, 15 (Nev. 2001). Further, the cause of action must be pled with particular  
 5 specificity as to “the manner in which a defendant joined in the conspiracy and how he participated  
 6 in it.” *Arroyo v. Wheat*, 591 F. Supp. 141, 144 (D. Nev. 1984).

7           Here, Sedlmayr fails to plead a claim for civil conspiracy with the required specificity.  
 8 Sedlmayr never identifies how each individual defendant participated or joined the conspiracy.  
 9 Further, Sedlmayr does not clearly identify the underlying tort that defendants committed. Sedlmayr  
 10 merely alleges that his loan was one of many executed in violation of Nevada laws. Therefore, the  
 11 court finds that Sedlmayr has failed to sufficiently plead a claim for civil conspiracy with the  
 12 requisite specificity.

13           **C. Racketeering**

14           In Nevada, civil racketeering claims brought under NRS 207.400, *et seq.*, must be plead  
 15 with specificity. *Hale v. Burkhardt*, 764 P.2d 866, 869 (Nev. 1988). That is, the complaint must  
 16 allege at least two predicate crimes related to racketeering in order to sufficiently plead a  
 17 racketeering claim upon which relief can be granted. *Id.*

18           Here, Sedlmayr merely alleges that his loan was one of many executed in violation of  
 19 Nevada laws. From the complaint, it is unclear what these violations were and, more importantly,  
 20 what the two requisite “crimes” were. Therefore, the court finds that Sedlmayr has failed to  
 21 sufficiently plead a claim for civil racketeering upon which relief can be granted.

22           **D. Unjust Enrichment**

23           To set forth a claim for unjust enrichment, a plaintiff must allege that a defendant unjustly  
 24 retained money or property of another against fundamental principles of equity. *See Asphalt Prods.*  
 25 *Corp. v. All Star Ready Mix*, 898 P.2d 699, 700 (Nev. 1995). However, an action for unjust

1 enrichment cannot stand when there is an express written contract which guides the activities of the  
2 parties. *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187  
3 (Nev. 1997).

4 Here, there was a written contract between the parties, namely, the deed of trust and  
5 mortgage note. These documents guided the interactions, obligations, and rights of the parties. As  
6 such, Sedlmayr cannot make a claim in equity for actions that are guided by a contract to which he  
7 is a party. See *LeasePartners Corp.*, 942 P.2d at 187-88.

8 **E. Declaratory Relief and Permanent Injunction**

9 Sedlmayr's remaining causes of action for injunctive and declaratory relief are remedies that  
10 may be afforded to a party after he has sufficiently established and proven his claims; they are not  
11 separate causes of action. See e.g., *In re Wal-Mart & Hour Employment Practices Litig.*, 490 F.  
12 Supp. 1091, 1130 (D. Nev. 2007) (holding that a claim for injunctive relief was not a separate cause  
13 of action or independent ground for relief). Here, Sedlmayr's remanded claims fail to establish a  
14 claim for relief. Accordingly, Sedlmayr is not entitled to his requested remedies.

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26

1 IT IS THEREFORE ORDERED that defendants' motion to dismiss (Doc. #37) and joinder  
2 to the motion to dismiss (Doc. #43) are GRANTED. Defendants Wells Fargo Bank, N.A.;  
3 MERSCORP, Inc.; Mortgage Electronic Registration Systems, Inc.; and US Bank National  
4 Association, as trustee for Residential Asset Securities Corporation, are DISMISSED as defendants  
5 as to the remanded claims: (1) claim 1 for violation of unfair lending practices, NRS 598D.100;  
6 (2) claim 10 for civil conspiracy; (3) claim 11 for racketeering activity in violation of Nevada law  
7 (4) claim 12 for unjust enrichment; (5) claim 3 for injunctive relief; and (6) claim 4 for declaratory  
8 relief.

9 IT IS FURTHER ORDERED that defendants' motions to dismiss filed prior to the order of  
10 remand (Doc. ##11, 16) are DENIED without prejudice.

11 IT IS SO ORDERED.

12 DATED this 7th day of July, 2011.



14 LARRY R. HICKS  
15 UNITED STATES DISTRICT JUDGE  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26